Supreme Court, U.S.
FILED

961220 JAN 28 1997

No. OFFICE OF THE CLERK

In The
Supreme Court Of The United States

October Term 1996

HERBERT MOREWITZ,II,

Petitioner,

V.

MILDRED H. ASHMORE,

Respondent,

On Petition for Writ of Certiorari
to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

Herbert Morewitz,II

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37pp

QUESTIONS PRESENTED FOR REVIEW

1. The Supreme Court of Virginia has decided in this case that an adult woman cannot assume the risks from signing a document, after reading and investigating its import with the Trustee, because she was unsophisticated in such matters. Is this so contrary to law that this court should exercise its power of supervision and reverse the decision?

2. The Supreme Court of Virginia has decided in this case that the Final Decree entered should be sustained when the Final Decree did not clarify as to whether the finding of fraud was against a Virginia corporation or against an individual. Is this so UNCONSTITUTIONAL, contrary to law that this court should exercise its power of supervision and reverse the decision?

3. The Supreme Court of Virginia has decided in this case that the evidence was sufficient to find fraud where it was not proved by clear and convincing evidence, and to consider the evidence in light most favorable to respondent. Is this so contrary to law that this court should exercise its power of supervision and reverse the decision?

4. The Supreme Court of Virginia has decided in this case that the trial court acted lawfully when it failed and refused to allow petitioner Morewitz to make closing statements/arguments on his own behalf and defense. Should this court reverse this action?

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HERBERT MOREWITZ,II
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V.

MILDRED H. ASHMORE
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Petition for Writ of Certiorari to the
Supreme Court of the United States
Virginia Supreme Court

Herbert Morewitz,II, respectfully petitions for a Writ of Certiorari to review the judgement of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The opinion of the Virginia Supreme Court is set out in Appendix, infra, 1a to 13a. That opinion affirmed in part and reversed in part, the decision of the Circuit Court of the City of Newport News, which is set out in the Appendix, infra, 14a to 16a. The Circuit Court Memorandum of March 29, 1995 is set out in Appendix, infra 17a to 20a. The Virginia Supreme Court denied a timely filed Motion for Re-hearing on November 1, 1996, set out in Appendix, infra, 21a.

JURISDICTION

Respondent (plaintiff) filed this case in the Circuit Court for the city of Newport News Virginia as a chancery matter under the provisions of section 55-22, Code of Virginia. Respondent was and is a citizen of Virginia. Petitioner, Herbert Morewitz,II is a citizen of Virginia and the amount in controversy is in excess of $50,000.00.

STATEMENT OF THE CASE

In 1992, Mildred H. Ashmore sold her home in the city of Newport News to Herbie Morewitz,Inc., a Virginia corporation. The promissory note made payable to Mrs. Ashmore was secured by a Deed of Trust made by Herbie Morewitz,Inc. dated November 23, 1992, conveying the property to Raymond H. Suttle, Jr. and Gustav L. Nelson as Trustees (JA-57, 18-20). According to the terms of the deed of trust, Ashmore could occupy the residence until January 31, 1994 at a rental amount of $400.00 per month, to be deducted from the principal balance of the note (JA-16-17).

Herbert Morewitz,II is the president of Herbie Morewitz,Inc.. In March of 1993, Ms. Ashmore expressed to Mr. Morewitz her desire to extend her occupancy of the residence to beyond the agreed upon date. Mr. Morewitz responded by saying that it would be fine, but that he might want to borrow against the property (JA-63).

Thereafter, Mr. Morewitz wrote a letter dated March 18, 1993, confirming that she could stay at the residence for longer than previously agreed. Morewitz also wrote that at time he borrowed against his properties and that he might borrow against the property she resided in. Morewitz also wrote that Ashmore's position would not change, and that she could withdraw some of her capital or leave it as is (JA-21). Morewitz testified that the language regarding that Ashmore's position would not change was in reference to her continued occupancy of the property, and to verify that she would continue to receive monthly payments. Morewitz testified that his decision to actually borrow against the property was made on March 22, 1993, a few days after the letter was mailed (JA-65).

An appointment was made for Ashmore to meet with Morewitz, and they met in Morewitz's office on March 24, 1993 (JA-63). Ashmore signed a Subordination Agreement, subordinating her deed of trust to a second deed of trust. The signed subordination agreement clearly states that the first deed of trust would now become subordinate to the second deed of trust (JA-22-29). Ashmore received consideration for signing the subordination agreement in the form of another agreement also signed on that same day. Ashmore and Morewitz signed an agreement whereby Ashmore could occupy the premises until January 31, 1995 and she could withdraw up to $25,000.00 from the principal sum due her (JA-34). Ashmore also received a check on that same day, being March 24, 1993 (JA-63).

The facts were initially in conflict as to whether or not Ashmore read the subordination agreement. On direct examination, Ashmore testified that the pages were not attached and that she signed the signature page without reading the document(JA-58,61). However, on cross examination, Ashmore admitted that she did read the subordination agreement, but not carefully (JA-62-63). The trial court ruled that "It is difficult for the court to accept that the complainant did not know that she was signing a subordination agreement." (JA-49).

On that same date, March 24, 1993, Morewitz wrote a memo to Raymond H. Suttle, Jr., Trustee on the first deed of trust (JA-35). The memo listed the phone numbers for Ashmore and the Notary who witnessed her signature, with a notation under Ashmore's name "talk w/her". Suttle testified that Morewitz suggested that he, Suttle, should call Ashmore to insure that she understood the agreement (JA-64). Suttle testified that he called Ashmore, and that she acknowledged that she understood that she would be in a second deed of trust, not first (JA-58,64). Ashmore testified that she never spoke to Suttle about subordinating her deed of trust to another. The trial court found that the telephone call actually took place (JA-58).

At trial, Ashmore produced an unsigned copy of the subordination agreement, with an extra sentence on page two. The unsigned document stated "Notice: the original agreement between Herbie

Morewitz,Inc. and Mildred H. Ashmore is not diminished or affected by this document". (JA-32). Ashmore testified that she found this document with some papers, that she did not know how she obtained it (JA-62). On cross examination, Ashmore admitted that the only document given to her on the day of the agreement was the check (JA-63). Ashmore admitted that she did not even see, read or rely upon the added sentence when she signed the subordination agreement (JA-62). Ashmore further testified that she could not say when she received this page or how she received it and that she just "found it" (JA-63). Ashmore could not state that the page with the second sentence was ever presented to her at the time she signed the recorded copy (JA-64). The agreement that was recorded was the agreement that Ashmore was presented and signed (JA-26-29,62). At the hearing, Morewitz was not allowed to make a closing statement on his own behalf(JA-66).

ANALYSIS

The Supreme Court of Virginia has grossly misinterpreted and misapplied the law and evidence in this case. At page eleven and twelve of the courts opinion they say that they find no merit in Morewitz's contention that the form of the that portion of the Final Decree, which deals with who the finding is against, is erroneous. However, the trial courts memorandum dated March 29, 1995, under the heading "Objection to Entry of the Final Decree" states that there was no evidence that the actions of Morewitz were outside his actual or apparent authority from the

corporation(JA-50). Therefore, because the trial court found that Mr. Morewitz did not act outside his actual authority from the corporation, the Final Decree should have clearly stated such, and the Final Decree should have been amended to show that the finding of fraud was made against Herbie Morewitz,Inc. and specifically not against Herbert Morewitz,II, individually. Moreover, there was absolutely no evidence to pierce the corporate veil, and thus, any finding rightfully should have been against the corporation.

At page eight of the courts opinion they say that there was convincing evidence that Morewitz intentionally and knowingly with the intent to mislead, falsely represented material facts to the plaintiff, that is, her first lien deed of trust would not change. The primary basis for this opinion was Morewitz's letter of March 18 1993 wherein Morewitz tells Ashmore that she can remain in the property beyond the original deadline and that he(Morewitz) may borrow against the property but that this would not change her position. Morewitz testified that this statement regarding Ashmore's "position" was in regards to her position as tenant and in no way was in reference to a deed of trust lien. More importantly, Morewitz did not even decide to borrow, much less subordinate, until the following week(JA-65), even the court recognizes this on page six of their opinion ,"Thereafter, in March of 1993, Morewitz sought a loan...". There was absolutely no evidence to show that on March 18, 1993, Morewitz had decided to borrow against the property at

all. Therefore, there is NO WAY Morewitz could have knowingly and/or intentionally mislead Ashmore when Morewitz himself had not yet decided to borrow against the property and in what manner, and without such knowledge or intent, there can be no finding of fraud at all.

There are Virginia cases directly contrary to the findings in this case. Where a plaintiff alleges fraud, she has the burden of proving fraud by clear and convincing evidence. Winn v. Aleda Construction,Co.,227 Va. 304, 308, 315, S.E.2d, 193, 195 (1984), and Malbon v. Davis, 185 Va. 748, 40 S.E.2d 183 (1946). The presumption of fraud can only be reached if the evidence shows that a " confidential or fiduciary relationship existed between the grantor and the deeds proponent, that the consideration was grossly inadequate, and that the grantor suffered from great weakness of mind." Hanson v. Harding 245 Va. 424 at 426, 429 S.E.2d 20 at 21, (1993), Martin v. Phillips, 235 Va. 523, 528-29, 369 S.E. 2d 397, 400 (1988), and Nuckols v. Nuckols, 228 Va. 25, 33-34, 36-37, 320 S.E.2d 734, 738-39, 740 (1984). This presumption is not applicable here, because there was no evidence that Ashmore was not intelligent or not mentally alert or that she did not have the capacity to make or execute the agreement. See Hanson, id., at 426.

"The presumption is that people who deal with each other, grown men and women, deal with each other as such, and this presumption is not destroyed by disparity

in age nor by the ties of blood, and this is particularly true where fraud is charged, either actual or constructive." Malbon v. Davis 185 Va. 748, 40 S.E.2d 183 at 187 (1946). Further, in fraud cases, the Virginia Supreme Court has held that adults deal with each other as adults. Carter v. Carter, 223 Va. 505, 291 S.E.2d 218, (1982). Our case is similar to Corbett v. Bonney, 202 Va. 933, 121 S.E.2d 476, (1961):

"Here the plaintiff had the ability and opportunity to read the release and it was her duty to do so before signing it. No valid excuse has been shown for not reading the instrument. She can not invoke her own heedlessness to discredit her solemn release, to call such heedleness another persons fraud. It is a cardinal rule that fraud must be proved by clear cogent and convincing evidence. On the record before us, the evidence does not measure up to that degree of proof, and we find, as a matter of law, that there was no fraud in the procurement of plaintiff's signature to the release."

Ashmore admitted that she read the subordination agreement before signing it (JA-63). Therefore, her perusal of the document shows that she did not rely on Morewitz. See Carter, id. and Bryant v. Peckinpaugh, et al., 241 Va. 172, 400 S.E.2d 201 (1991). As to plaintiff's exhibit Nine(9) (JA-31), no testimony was offered to show that Morewitz prepared it , gave it to Ashmore, or ever had it in his hands. Therefore, Morewitz could not have been found to have used the document

to commit a fraud.

Raymond H. Suttle,Jr., the Trustee on the first deed of trust, testified that he telephoned Ashmore on March 24, 1993, after he received the subordination agreement with Ashmore's signature. Suttle explained to Ashmore "that the effect of this subordination agreement was that she would now be in a second lien position, not first." (JA-58). According to Suttle, Ashmore stated that she understood(JA-64). There was absolutely no showing that Morewitz had the intent to defraud Ashmore. Morewitz suggested to Suttle that suttle call Ashmore to insure that she understood the subordination agreement (JA-64). Morewitz provided Suttle with the phone numbers of Ashmore and the Notary who witnessed her signature. Even though Ashmore testified that she never spoke to Suttle, the trial court found her not to be credible and found that the telephone call took place (JA-58). Where the trial court has found that Ashmore knew that she was signing a subordination agreement, (JA-49) and that she received the telephone call (JA-58), where she stated that she understood that she would now have a second lien deed of trust (JA-64), the finding that the document was induced by fraud is without evidence to support it and there was no reliance on any alleged misrepresentation.

Furthermore, the subordination agreement was fully explained to Ashmore by Suttle, and this conversation amounts to an "investigation" in that she had the opportunity to ask questions about the

agreement. Indeed, after being informed that she would have a second lien deed of trust, she stated that she understood. The court said that in Harris v. Dunham, 203 Va. 760, 127 S.E.2d 65 at 71 (1962);

The evidence before us shows conclusively that Dunham had a full opportunity to investigate completely, with readily available sources of information. Had he taken advantage of his opportunity and elected to exhaust the available information, he could have easily discovered those things which he now says were misrepresented to and concealed from him.

By way of Ashmore's conversation with Suttle, Ashmore discovered what she now says was misrepresented to and concealed from her, yet did not stop the Trustee from consummating the document with his endorsement. Therefore, she did not rely on any alleged misrepresentation by Morewitz, and she clearly understood the import of the document and consented to it.

Dicta found in Harris v. Dunham, Supra. aptly fits Ashmore's case ;

The Common Law affords to everyone reasonable protection against fraud in dealing, but does not go to the romantic lengths of giving indemnity against the consequences of indolence and folly, or careless indifference to the ordinary and accessible means of information.

It is readily apparent that the finding of fraud, and other findings /opinions

against Morewitz were wrong and without clear and convincing evidence to support them.

CONCLUSION

The Virginia Supreme Court rulings in this case are directly opposite established case law and previous court decisions. At the same time, those rulings are so inconsistent, wrong and unconstitutional as to require that this court use it supervisory capacity to correct the Virginia Supreme Court. This court should reverse the judgement of the Virginia Supreme Court that deals with the finding of fraud and/or against whom the finding of fraud was against and dismiss this case.

RESPECTFULLY SUBMITTED

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APPENDIX

IN THE SUPREME COURT OF VIRGINIA

Present: All the Justices
OPINION BY JUSTICE A. CHRISTIAN COMPTON
September 13, 1996

MILDRED H. ASHMORE
V. Record No. 952137
HERBIE MOREWITZ,INC., ET AL.

HERBIE MOREWITZ,INC., ET AL
V. Record No. 952155
MILDRED H. ASHMORE

From the Circuit Court of the city of Newport News
Robert W. Curran, Judge

In this creditor's rights controversy arising from a real estate sales transaction, the principal issues are whether fraud has been established in connection with the execution of a subordination agreement and, if so, whether application of the third party beneficiary statute, Code 55-22, affects the priority of liens. A subsidiary issue deals with the nature of the fraud.

In April 1994, plaintiff Mildred H. Ashmore filed a bill of complaint against defendants Herbie Morewitz,Inc., Herbert Morewitz,II, Statewide, Inc. Raymond H. Suttle,Jr., Trustee, and Richard M. Macaluso, Trustee. The plaintiff alleged she is a widow over 70 years of age living alone at the Newport News home formerly owned jointly with her late husband. Plaintiff asserted she had been living on a fixed income "barely adequate to meet

her needs" and, in 1992, decided to convert the subject property into an income producing asset. The plaintiff alleged she decided to find a purchaser for the property who would buy it "on seller financed terms which would provide her with a stream of income from note payments secured by a purchase money deed of trust on the property and at same time allow her to remain in the property at a reasonable monthly rental for a period of time".

Plaintiff further alleged that, based on prior contact with defendant Herbert Morewitz,II, "she believed him to be an astute and experienced real estate investor who regularly bought and sold properties as part of his business". Plaintiff also alleged that, responding to her request, Morewitz came to her home to discuss the matter. He presented her with a real estate purchase contract setting forth terms of a proposed sale of the property to defendant Herbie Morewitz,Inc., "a corporation solely owned and controlled by Morewitz".

The plaintiff alleged that, in accord with the contract, she executed and delivered a deed of bargain and sale dated in November 1992 conveying the property to Herbie Morewitz,Inc. (hereinafter, the corporation). At the same time, the corporation made and delivered a purchase money promissory note in the sum of $82,000 payable to the plaintiff's order. This note was secured by a first lien purchase money deed of trust made by the corporation conveying the property in

trust to defendant Suttle and another trustee to secure payment of the note. The deed and deed of trust were duly recorded.

The plaintiff further alleged that Morewitz "assured" her that she would always have a first lien deed of trust on the property as security for payment of the note. She also alleged that Morewitz never asked her to subordinate the deed of trust to a later deed of trust on the property.

The plaintiff further alleged that she "happened to be in Morewitz's office" on March 24, 1993 when he said "he had 'sold the paper' related to the property and needed for her to sign a document connected with that activity." She asserted Morewitz presented her with a single sheet of paper bearing a line for her signature and containing two blank acknowledgement forms. She alleged Morewitz did not tell her that the sheet, which she signed, was actually the last page of a three page document.

The plaintiff alleged she later learned, when the corporation became delinquent in the payment of the note, that the document was an agreement in which she consented to the subordination of the lien of the purchase money deed of trust to the lien of another deed of trust on the property from the corporation to defendant Macaluso, trustee, securing a note made by the corporation in the principal sum of $52,500 payable to defendant Statewide, Inc. Both the subordination agreement and the other deed of trust had been recorded.

The plaintiff alleged the subordination agreement was void due to fraud of Morewitz and the corporation. She further alleged that Statewide was a third party beneficiary of the purported agreement and, as such, takes its interest in the property subject to any defenses which she may have against the corporation. She asserted that Statewide's rights under the purported agreement can rise no higher than the rights of the corporation under such instrument.

In the prayer to the bill of complaint, the plaintiff asked that the subordination agreement be declared void and that she be declared the holder of the first lien deed of trust on the property. In a responsive pleading, Morewitz, "individually and as President & Agent of Herbie Morewitz,Inc.," denied the allegations of fraud. He affirmatively asserted that he advised the plaintiff to "seek counsel if she did not understand the subordination agreement" and that trustee Suttle "verified" with the plaintiff "that she had, in fact, signed the agreement and understood its content". Morewitz asked the court to dismiss the bill of complaint, issue an order allowing him access to the property to facilitate its sale, and order the plaintiff to vacate the property.

The trial court considered testimonial and documentary evidence in an ore tenus hearing in January 1995. Subsequently, in an October 1995 Final Decree, the court ruled that the plaintiff's signature to

the subordination agreement was obtained by fraud of Morewitz acting on behalf of the corporation, that the fraud made the agreement voidable, that no evidence was produced to establish any knowledge of the fraud by Statewide, and that the plaintiff's request to be declared holder of a first lien deed of trust on the property be denied.

We awarded separate appeals to the plaintiff, on one hand, and to the corporation and Morewitz, on the other, consolidating them for argument. The plaintiff contends the trial court erroneously determined that even though her execution of the subordination agreement was induced by the fraudulent misrepresentations of Morewitz, this rendered the agreement voidable rather than void. The plaintiff also contends the trial court erroneously found that the rights of Statewide under the agreement were not affected by Morewitz's fraud and that Statewide did not take its interest in the property subject to the defense of fraud which plaintiff had against the corporation .

In the cross appeal, the corporation and Morewitz contend the trial court erred in finding that fraud had been proved by clear and convincing evidence.

The record on appeal does not include a verbatim transcript of the testimony at trial, only a Rule 5:11(c) written statement of facts in lieu of a transcript. Many of the relevant facts

were disputed but, applying settled appellate principles, we accord the judgement of the trial court, including the court's finding of fact that are supported by credible evidence, a presumption of correctness. Thus, we shall recite such facts as found by the chancellor.

First, we shall address the issue of law raised in the cross appeal, that is, whether the plaintiff proved fraud by the requisite clear and convincing evidence. The parties evidence essentially supported the allegations made in their pleadings. The plaintiff established that "on several occasions" after the closing of the sale of the property to the corporation, Morewitz told her "that he might want to borrow against the property, or 'sell the paper', but assured her that her position would not be changed". In a letter dated March 18, 1993, Morewitz wrote plaintiff confirming "our conversation in regards to your possible need to occupy the house beyond a one year term," stating he was "agreeable" to extending her occupancy "to whatever date your comfortable with". In a second paragraph, Morewitz wrote: "Also, from time to time, I borrow against properties that I own to expand my investment enterprise. I may borrow against the subject property but please know that this will not change your position at all". Morewitz later testified this statement "was in reference to her continued occupancy of the property and to verify that she would continue to receive monthly payments."

Thereafter, in March 1993, Morewitz "sought a loan" for the corporation from Statewide, which advised him that "such a loan" would be made if he "could give Statewide a first lien deed of trust on the property as security for the loan." According to the statement of facts, Morewitz then took the subordination agreement, prepared by Statewide's attorney, to the plaintiff, telling her "that the instrument was just a routine document which would enable him to 'sell the paper' related to the property". The plaintiff, who was "unsophisticated in such matters" relied on Morewitz and executed the subordination agreement. She testified that the pages of the document "were not attached to each other and she signed the signature page without reading the document". During cross-examination, the plaintiff, when asked, "Did you read the document at all before signing it?" replied, "I read it, but not carefully."

Trustee Suttle, who testified Morewitz had written him a memo suggesting he call the plaintiff "to ensure that she understood the agreement", stated that when the document was presented for his signature, he telephoned the plaintiff and explained to her "that the effect of this subordination agreement was that she would now be in a second lien position, not first." Disputing this testimony, the plaintiff testified she never spoke to Suttle about subordinating her deed of trust to another deed of trust." The chancellor found the telephone call took place but that the plaintiff "failed to

understand the legal effect of the document because of the fraudulent misrepresentations which Morewitz had previously made to her."

The plaintiff also established that she later found in her files the draft of an unsigned subordination agreement like the document she signed. The unsigned document, however, contained "an extra sentence" stating,"Notice: The original agreement between Herbie Morewitz,Inc. and Mildred H. Ashmore is not diminished or affected by this document." The plaintiff did not how or when the document came into her possession, stating "it may have come from Mr. Morewitz's office." The plaintiff admitted she did not rely on the extra sentence when she signed the agreement.

Morewitz testified that the extra sentence appeared to be a "working" or "rough draft" copy of the agreement, and that he did not recall making any alteration to the copy prepared by Statewide's attorney. According to the statement of facts, Morewitz "did not absolutely deny" making the alteration, "because he could not recall this sentence at all."

A party seeking to establish fraud must prove by clear and convincing evidence a false representation, of a material fact, made intentionally and knowingly, with the intent to mislead,reliance by the party misled, and resulting damage to such party. Thompson v. Bacon, 245 Va. 107,111, 425 S.E.2d 512, 514 (1993). Clear and convincing evidence is that degree of

proof which will produce in the mind of the trier of facts a firm belief or conviction concerning the allegations sought to be established. Fred C. Walker Agency,Inc. v. Lucas, 215 Va. 535, 540-41, 211 S.E.2d 88, 92 (1975). Viewing the facts, as we must, in the light most favorable to the plaintiff who prevailed below on this issue, we hold that the plaintiff's proof burden has been carried on the fraud question.

There was credible, clear and convincing evidence to support the trial court's finding that Morewitz, intentionally and knowingly with the intent to mislead, falsely represented material facts to the plaintiff, that is, her first lien "position" would not be changed if he" sold the paper" and the subordination agreement "was just a routine document" enabling him to "sell the paper". Further, such evidence supports the court's implicit findings that plaintiff relied on the false representation and was relegated to a second lien position to her detriment as the result of executing the subordination agreement. Thus, we hold no merit in the cross appeal.

Turning next to the plaintiff's contention that the nature of the fraud made the agreement void, and not voidable, we hold the trial court correctly ruled the agreement was voidable.

When a promisor knows what is being signed but the promisor's consent is induced by fraud, mutual consent is present and a

contract is formed, which, because of the fraud, is voidable. In other words, "the act of the defrauded person is operative though voidable". 12 Williston on Contracts 1488, at 332 (3d ed. 1970).

On the other hand, if the fraud operates at the inception of the agreement so that the promisor actually does not know what is being signed, or does not intend to enter into a contract at all, mutual assent is lacking and the act of the promisor is void; the purported agreement may be disregarded without the necessity of rescission. Id. See Elam v. Ford, 145 Va. 536, 545, 134 S.E. 670, 672 (1926).

In the present case, the trial court found that the plaintiff knew she was signing a subordination agreement, but that she would not have so acted without Morewitz's misrepresentations regarding its legal effect on her position of priority. The court thus found, obviously with the foregoing principles in mind, " that this is the case where the act of the defrauded person is operative though voidable." There is credible evidence to support such finding.

Finally, we address the plaintiff's alternative argument that, even if the trial court correctly ruled the agreement is voidable, the court nonetheless erred in refusing to apply code 55-22 and to rule Statewide took its interest in the property subject to the defense of fraud that she had against the corporation. We agree with the plaintiff.

Code 55-22, the third-party beneficiary statute, provides:

"An immediate estate or interest in or the benefit of a condition respecting any estate may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made for the benefit, in whole or in part, of a person with whom it is not made, or with whom it is made jointly with others, such person, whether named in the instrument or not, may maintain in his own name any action thereon which might maintain in case it had been made with him only and the consideration had moved from him to the party making such covenant or promise. In such action the covenantor or promisor shall be permitted to make all defenses he may have, not only against the covenantee or promisee, but against such beneficiary as well."

This statute enables a third party to take an interest under an instrument, although not a party to it, if the promise is made for the third party's benefit and the evidence shows that the contracting parties clearly and definitely intended to confer a benefit upon such third party. Kelley v. Griffin, 252 Va. 26, 29, 471 S.E.2d 475, 477 (1996).

In the present case, the evidence is clear that the subordination agreement between the plaintiff and the corporation is intended to confer a benefit upon Statewide, a nonparty. Under that agreement, Suttle as trustee and plaintiff

as beneficiary of the November 1992 deed of trust agreed that the lien of that deed of trust shall be subordinated to and in favor of the other deed of trust, dated March 1993, securing the debt to Statewide, which actually is named in the body of the subordination agreement. Thus, under code 55-22 Statewide could enforce the subordination agreement against plaintiff.

But the last sentence of Code 55-22 further provides that the plaintiff, as coventor or promisor of the instrument, shall be permitted to make all defenses she may have against Statewide, the third-party beneficiary. In other words, the third-party beneficiary's rights under the instrument, according to the statute, can rise no higher than the rights of the corporation, the coventee or promisee under the instrument. Thus, we hold that Statewide took its interests under the subordination agreement subject to the plaintiff's right to rescind the agreement because of Morewitz's fraud, even though Statewide had no knowledge of the fraud.

Accordingly, we will affirm so much of the final decree which finds that the plaintiff's signature on the subordination agreement was obtained by the fraud of Herbert Morewitz,II, acting on behalf of Herbie Morewitz,Inc., and which finds that the fraud made the agreement voidable. Parenthetically, we find no merit in the contention made by the corporation and Morewitz that the form of this portion of the decree is erroneous.

We will reverse the remainder of the final decree. We will enter a final judgement here setting aside the subordination agreement and declaring the plaintiff to be the holder of a first lien deed of trust on the subject property.

Record No.

952137 Affirmed in part,

reversed in part,

final judgement.

Record No.

952155 Affirmed

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

MILDRED H. ASHMORE
Complainant,

vs.
CHANCERY NO. 25466-RC

HERBIE MOREWITZ, INC., et als,
Respondents,

FINAL DECREE

This cause came to be heard on the 3rd day of January 1995 upon a Bill of Complaint filed herein, all parties herein having been present in person or by counsel, the Court having fully heard the testimony and considered the evidence and the arguments of counsel.

Upon consideration whereof the court makes the following findings and ruling, to-wit:

1. The signature of Complainant to the agreement of subordination (Complainants exhibit 8) was obtained by the fraud of Respondent, Herbert Morewitz,II, acting on behalf of the Respondent, Herbie Morewitz,Inc.

2. The fraud of Herbert Morewitz,II aforesaid made subordination agreement voidable.

3. No evidence was produced to establish any knowledge of the aforesaid fraud of Herbert Morewitz II by the respondent, Statewide,Inc.

4. The request by complainant to have her declared to be the holder of a first lien deed of trust on the real

property (the property) located at 7 Sir Francis Wyatt Place, Newport News Virginia and more particularly described in the bill of complaint, is hereby denied.
5. The request by complainant that Statewide Inc. and Richard Macaluso, Trustee be enjoined and restrained from foreclosing or exercising any power of sale under the deed of trust recorded in Deed Book 1310, page 1416 is hereby denied.

Complainant hereby objects and excepts to the finding and ruling of the court set forth in 2. above on the ground that the evidence establishes that the fraud of Morewitz made the purported subordination agreement void rather than voidable. Complainant hereby objects and excepts to the findings and rulings of the court set forth in 4. and 5. above, on the ground that Statewide, Inc. is a third party beneficiary of the purported subordination agreement (complainant's Exhibit 8) which the court found was obtained from complainant by the fraud of Herbert Morewitz,II. Therefore, under the provisions of Section 55-22, Code of Virginia, Statewide takes its rights in the property under the subordination agreement subject to the defense of fraud in the inducement and subject to Complainant's right, based on such fraud, to have the subordination agreement set aside.

The defendants, Herbie Morewitz,Inc. and Herbert Morewitz,II, hereby object to and except to the findings and rulings of the

court and to the final decree on the grounds that the evidence was insufficient for a finding of fraud against either defendant in that fraud was not proven by clear and convincing evidence. The defendants, Herbie Morewitz,Inc. and Herbert Morewitz,II, hereby object to and except to the findings and ruling of the court and to the final decree on the grounds stated in appellant's objection to entry of final decree previously filed with this court. The defendants, Herbie Morewitz,Inc. and Herbert Morewitz,II hereby object to and except to the findings and rulings of the court and to the entry of the final decree on the grounds that the appellant's Motion for a re-hearing based upon newly discovered evidence should have been granted for the reasons set forth in said motion.

It is further ordered that this case be stricken from the docket and placed among the ended causes.
ENTER; October 17, 1995

/S/ Robert W. Curran
Circuit Court Judge

Memorandum to the file
Chancery No. 25466-RC
Ashmore v. Morewitz, et al
Subject: Motions and Objections
March 29, 1995

The court denies the Motion for Rehearing filed by complainant, Mildred H. Ashmore.
The court overrules the Objection to Entry of Final Decree filed by respondent, Herbert Morewitz,II.
The court denies the Motion for rehearing based upon newly discovered evidence filed by respondent, Herbert Morewitz,II.

Motion for rehearing filed by complainant, Mildred H. Ashmore
The court has reviewed the motion and applicable law. The court does not disagree with the statement of law, but disagrees with the application to the facts of this case.
It is difficult for the court to accept that the complainant did not know she was signing a subordination agreement. Complainant's exhibit #9 is called "This agreement of Subordination" and the word subordinate, or other forms of the word, are contained four (4) other times in the document. Moreover, there was evidence from Mr. Suttle that the issue of a subordination was discussed with the complainant.
The recorded subordination agreement (complainant's exhibit #8) nearly matches the agreement the complainant maintains she signed (complainant's exhibit #9). The only apparent difference is the language: Notice: The original agreement between

Herbie Morewitz,Inc. and Mildred H. Ashmore is not diminished or affected by this document.
While Mrs. Ashmore may have been mislead as to the protection Mr. Morewitz was providing, she clearly signed a document that stated that the party of the fourth part (Mildred H. Ashmore, additional Grantor) and the Trustee agree that her (mrs. Ashmore's) lien is absolute and unconditionally subordinated.
The facts of this case are that Mr. morewitz, by the addition of the paragraph and by the language of his letter of March 18, 1993 (complainants exhibit #6) and other actions, induced the complainant to assent to something she would not otherwise have done. She signed a subordination agreement which clearly subordinated her lien to that of Statewide, Inc., but she was induced to sign it by misrepresentations as to its effect on the relationship with Mr. Morewitz.
It is the courts position that this is the case where the act of the defrauded person is operative though voidable.

Objection to entry of final decree
The final decree as presented reflects the findings and rulings of this court at trial. The memorandum of January 10, 1995, is a summary of the findings apparent to all present in court. It is not intended to be an exhaustive written opinion.
The issues raised by paragraph 2 of the objections are resolved by reference to Tri-State Coach Corp. v. Walsh, 188 Va. 299 (1948) and Davis v. Merrill, 133 Va.

69 (1992). These cases set out when an act is deemed to be within the scope of employment and the responsibilities of a corporation for the act of its employees,etc. There was no evidence that the actions of Mr. Morewitz were outside his actual or apparent authority from the corporation.
The issue raised in paragraph 3 of the objections has to do with distinctions that the court made at trial between voidable as opposed to void. If in fact the court had ruled that the document was void, the motion filed by the complainant to set aside the entire transaction would have been granted.

Motion for rehearing based upon newly discovered evidence
The cases hold that motions for new trials based on the ground of newly or after discovered evidence are addressed to the sound discretion of the trial judge and should be awarded with great reluctance and with special care and caution.
The evidence proffered by the respondent, Herbert Morewitz,II, in paragraphs 2 and 3, does not meet the requirements of after discovered evidence which should result in a new trial.
It is the court's position that in the exercise of reasonable diligence the evidence could have been secured at the former trial. The documents which complainant intended to use could have been discovered prior to trial.
The court's previously filed memorandum indicates that the court based its decision on all testimony and the

complainants exhibits #6 and #8, as well as exhibit #9. The evidence proffered by the respondent does not establish that it is likely that such proffered evidence would produce a different result at a new trial.

/s/ Robert W. Curran, Judge

Virginia: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond Virginia on Friday the 1st day of November, 1996.

Herbie Morewitz,Inc., et al.,
Appellants,

against Record No. 952155
Circuit Court No. 25466-RC

Mildred H. Ashmore,
Appellee,

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgement rendered herein on the 13th day of September, 1996 and grant a rehearing thereof, the prayer of said petition is denied.

A Copy,

Teste:

/s/David R. Beach

Clerk